Sakuragawa Pump (S) Pte Ltd v Perkapalan Mesra Sdn Bhd

HIGH COURT (KUCHING) — COMPANIES WINDING–UP NO 28–33 OF 2006–II
HAMID SULTAN JC
8 AUGUST 2007

Companies and Corporations — Winding up — Application for stay of winding up proceedings — Foreign judgment obtained — Judgment duly registered — Application to set aside registration of judgment — Whether stay ought to be granted

Companies and Corporations — Winding up — Application for stay of winding up proceedings — Shareholders had filed an originating application under s 181 of the Companies Act 1965 — Whether stay ought to be granted pending outcome of s 181 proceeding

The petitioner had obtained a final judgment in the High Court of Republic of Singapore and the petitioner applied to wind up the respondent pursuant to s 218(1)(e) of the Companies Act 1965 ('CA 1965') for inability to pay its debts. The said judgment was duly registered here by an order of court dated 6 December 2005. The respondent had filed an application (encl 31) for a stay of proceedings pending their application to set aside the foreign judgment based on the grounds that in the event the foreign judgment was set aside this would render the winding up petition to be struck out. The shareholders of the respondent had filed an application (encl 76) to stay the proceedings of this action pending the outcome of an originating application filed under s 181 of the CA 1965 ('s 181 petition') filed in another court or alternatively to transfer the petition for it to be heard in either court. The respondent opposed the petition on several grounds, inter alia (i) that the notice of registration of foreign judgment was defective and bad on the ground that it failed to state the particulars of the order for registration and failed to state the alleged outstanding amount in the currency of Malaysia; (ii) High Court of Sabah and Sarawak in Kuching had no jurisdiction to determine the quantum of the award of costs granted by the High Court of Singapore; (iii) the respondent had applied to set aside the registration of the judgment; (iv) statutory notice pursuant to s 218 of the CA 1965 was defective as it failed to state its demand in the currency of Malaysia. The said application was dismissed by the learned deputy registrar and was now a subject matter of appeal before the judge.

Held:

(1) Merely alleging there was an application to set aside the registration of the foreign judgment did not come within the provision of s 221(1) of the CA 1965 on court's discretion to stay proceedings in a winding up. Further the

foreign judgment was regularly given by a court of competent jurisdiction. The respondent having notice of that proceedings did not take steps to protect their rights, if any. As a matter of principle and jurisprudence, a foreign judgment of competent jurisdiction must prima facie be respected, whether or not it comes within the provision of the Reciprocal, Enforcement Judgment Act, 1958 (REJA 1958) (see para 6).

(2) The s 181 petition was in respect of matters to do with the shareholders of the company. The s 218 petition presented by the creditors on the grounds of the respondent's inability to pay the debt. There was no nexus between the s 181 and s 218 petitions for it to be stayed or transferred (see para 7).

(3) A creditor to whom the company was indebted to a sum exceeding RM500, could present a winding up petition. The sum claimed must be a liquidated amount. There was no requirement that all sum claimed must be liquidated. As long as a sum exceeding RM500 was a liquidated sum, it was sufficient to satisfy the requirement set out in s 218(2)(a) of the CA 1965. The petitioner here held a final judgment from a court of competent jurisdiction which till date had not been set aside or there was no credible evidence to show that the respondent had made prompt attempt to contest the judgment in Singapore or set aside the registration of the said judgment (see paras 10–11).

(4) There was no rigid rule that the sum claimed in the statutory demand must be the precise sum (see *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46). The learned judge in that case held that the real issue was whether the company was able to pay its debt. The purported grounds raised by the respondent could only amount to sham grounds in respect of an application under s 218(1)(e) of CA 1965. For, the law in principle required the respondent to demonstrate that the respondent could pay the debts rather than to say that he had good reasons why the final judgment should not be paid (see paras 12–13).

Obiter:

The court viewed that REJA 1958 only regulates the manner the foreign judgment of reciprocating countries can be registered here and gives full force for the purpose of executing the same. This Act did not prohibit the courts from recognising the judgment of foreign courts of competent jurisdiction, in what ever manner they think necessary and fit for the purpose of adjudicating any matter before the court. The REJA 1958 must also be read with the provision of ss 40 to 44 of Evidence Act 1950, where applicable and necessary (see para 6).

[Bahasa Malaysia summary

Pempetisyen telah memperolehi penghakiman muktamad di Mahkamah Tinggi Republik Singapura dan pempetisyen memohon untuk menggulungkan responden menurut s 218(1)(e) Akta Syarikat 1965 ('AS 1965') untuk ketidakupayaannya untuk membayar hutangnya. Penghakiman tersebut didaftarkan di sini melalui perintah mahkamah bertarikh 6 Disember 2005. Responden memfailkan satu permohonan (kandungan 31) untuk satu penggantungan prosiding sementara menunggu permohonan mereka untuk mengenepikan penghakiman luar negara tersebut

berdasarkan alasan-alasan sekiranya penghakiman luar negara tersebut diketepikan ini akan menyebabkan petisyen penggulungan dibatalkan. Pemegang-pemegang saham responden telah memfailkan satu permohonan (kandungan 76) untuk penggantungan prosiding ini sementara menunggu keputusan saman pemula yang difailkan di bawah s 181 AS 1965 ('petisyen s 181') di mahkamah yang lain atau secara alternatif untuk memindahkan petisyen tersebut untuk di dengar di mana-mana antara dua mahkamah tersebut. Responden membantah petisyen tersebut atas beberapa alasan, inter alia (i) notis pendaftaran penghakiman luar negara adalah cacat dan tidak sah atas alasan ia gagal menyatakan butir-butir perintah untuk pendaftaran dan gagal menyatakan amaun yang perlu dibayar tersebut di dalam matawang Malaysia; (ii) Mahkamah Tinggi Sabah dan Sarawak di Kuching tidak mempunyai bidang kuasa untuk memutuskan kuantum kos award yang diberikan oleh Mahkamah Tinggi Singapura; (iii) responden memohon untuk mengenepikan pendaftaran penghakiman terrsebut; (iv) notis statutori mengikut s 218 AS 1965 adalah cacat oleh kerana ia gagal menyatakan tuntutannya dalam matawang Malaysia. Permohonan tersebut dibatalkan oleh timbalan pendaftar yang bijaksana dan kini menjadi tajuk pokok rayuan di hadapan hakim.

Diputuskan:

(1) Hanya menyatakan bahawa terdapat satu permohonan untuk mengenepikan pendaftaran penghakiman luar negara tidak menjadikan ia terangkum di bawah peruntukan s 221(1) AS 1965 iaitu budi bicara mahkamah untuk menggantungkan prosiding penggulungan. Lanjutan penghakiman luar negara adalah biasa diberikan oleh sebuah mahkamah dengan bidang kuasa yang kompeten. Responden mempunyai notis prosiding tersebut tidak mengambil apa-apa tindakan untuk melindungi hak-haknya, sekiranya ada. Secara prinsip, dan jurisprudens, satu penghakiman luar negara dengan bidang kuasa yang kompeten harus secara prima facie dihormati, sama ada ia terangkum di bawah peruntukan Akta Penguatkuasa Salingan Hukuman 1958 (APSH 1958) (lihat perenggan 6).

(2) Petisyen s 181 adalah berhubungan dengan perkara-perkara berkaitan dengan pemegang-pemegang saham syarikat. Petisyen s 218 yang dikemukakan oleh pemiutang-pemiutang atas alasan-alasan ketidakupayaan responden membayar hutangnya. Tiada nexus di antara petisyen-petisyen s 181 dan s 218 untuknya digantungkan atau pun dipindahkan (lihat perenggan 7).

(3) Seseorang pemiutang yang mana syarikat berhutang kepadanya untuk jumlah yang melebihi RM500 boleh mengemukakan satu petisyen penggulungan. Jumlah yang dituntut mestilah satu jumlah tertentu. Tiada keperluan untuk kesemua jumlah yang dituntut ditentukan. Selagi jumlah melebihi RM500 adalah satu jumlah tertentu, ia adalah mencukupi untuk memuaskan keperluan yang dinyatakan di s 218(2)(a) AS 1965. Pempetisyen di sini mempunyai satu penghakiman muktamad daripada satu mahkamah dengan bidang kuasa yang kompeten yang sehingga hari ini masih belum diketepikan atau tiada sebarang bukti yang keterangannya boleh dipercayai untuk menunjukkan bahawa responden telah membuat percubaan segera untuk

mempertikaikan penghakiman di Singapura atau mengenepikan pendaftaran penghakiman tersebut (lihat perenggan 10–11).

(4) Tiada rukun yang ketat bahawa jumlah yang dituntut di tuntutan berkanun mestilah merupakan jumlah yang tepat (lihat *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46). Hakim yang bijaksana di kes tersebut memutuskan bahawa isu sebenarnya ialah sama ada syarikat dapat membayar hutangnya. Alasan-alasan yang kononnya dibangkitkan oleh responden hanya merupakan dalihan berhubung dengan permohonan di bawah s 218(1)(e) AS 1965. Oleh kerana sebagai prinsip, undang-undang memerlukan responden menunjukkan bahawa responden dapat membayar hutang-hutangnya daripada mengatakan bahawa ia mempunyai alasan-alasan yang baik mengapa penghakiman muktamad tersebut tidak harus dibayarnya (lihat perenggan 12–13).

Obiter:

Mahkamah berpendapat APSH 1958 hanya mengawal cara penghakiman asing negara-negara salingan dapat didaftarkan di sini dan memberi kesan sepenuhnya untuk tujuan melaksanakannya. Akta ini tidak menghalang mahkamah-mahkamah daripada menerima penghakiman asing mahkamah-mahkamah dengan bidang kuasa yang kompeten, dalam apa-apa cara pun yang dianggap perlu dan sesuai bagi tujuan mengadili sebarang perkara di mahkamah. APSH 1958 harus dibaca dengan peruntukan ss 40–44 Akta Keterangan 1950, sekiranya terpakai dan perlu (lihat perenggan 6).]

Notes

For a case on application for stay of winding up proceedings, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 997.

Cases referred to

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)
PT Bank Mandiri (Persero) Tbk v Karambunai Corp Berhad CWU No K28–54 of 2004 (unreported) (refd)
Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd [1990] 2 MLJ 46 (refd)
Official Liquidator Golcha Properties (P) Ltd v Dharti Dhan (P) Ltd AIR 1977 SC 740 (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100 (refd)
Schibsy v Westenholz [1870] LR 6 QB 155 (refd)
Sirdar Gurdyal Singh v The Rajah of Farikode [1894] AC 670 (refd)
Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313 (refd)
Udos ak Riging, Re [1994] 3 MLJ 383 (refd)
YPJE Consultancy Service Sdn Bhd v Helelr Factoring (M) Sdn Bhd [1996] 2 MLJ 482 (refd)

Legislation referred to

Companies Act 1965 ss 181, 218(1)(e), 221(1)
Evidence Act 1950 ss 40–44
Reciprocal, Enforcement Judgment Act 1958 s 3(4)
Rules of the High Court 1980 O 67

Stanley Eddy (Battenberg & Talma) for the petitioner.
Kenny Yi (Yi & Co) for the respondent.
James Lo (George Lo & Partners) for the contributory (PUNB).
Derbe Tang (Chew, Jugah Wan Ullok & Co) for the creditor of Bank Pembangunan Malaysia.
Lim Lip Tze (Reddi & Co) for the creditor of Danaharta Manager Sdn Bhd.
Daisy Tham (Tham & Co) for the receiver and manager.
Peter Nise a/k Manis (Insolvency Department) for the Officer Receiver.

Hamid Sultan JC:

[1] This is my judgment in respect of the petitioner's application to wind up the company pursuant to s 218(1)(e) of the Companies Act 1965 ('CA 1965') for inability to pay its debts. I have previously, on 27 July 2007, dismissed the respondent's and shareholders' application for stay, encll 31 and 76 respectively, besides setting out the grounds for dismissal in this judgment, as per the said order.

[2] The petitioner had obtained a final judgment in the High Court of Republic of Singapore and the petition is based on non-payment of judgment sum. The said judgment was duly registered here by an order of court dated 6 December 2005, pursuant to Originating Summons No 24–413 of 2005–II. The respondent, after some time had filed an application, seeking extension of time to file an application to set aside the order of registration of the foreign judgment. The said application was dismissed by the learned deputy registrar and is now a subject matter of appeal before the judge.

RESPONDENT'S STAY

[3] The respondent has filed an application (encl 31) in this action to seek a stay of this proceedings pending their application to set aside the foreign judgment. They have done the same on the grounds that in the event the judgment is set aside this would render the winding up petition to be struck out.

[4] The court has a wide discretion in a winding up proceeding to stay the proceedings on such terms as it thinks fit. Support for the proposition can be found in s 221(1) of the CA 1965 which reads as follows:

> (1) On hearing a winding up petition the court may dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make any interim or other order that it thinks fit, but the court shall not refuse to make winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets or in the case of a petition by a contributory that there will be no assets available for distribution amongst the contributories.

[5] For purpose of these statutory interlocutory relief, the applicant need not demonstrate special circumstances for the application to succeed as has been

articulated by a number of cases in relation to stay of execution of judgment sum. However, the applicant must demonstrate bona fide grounds for the court to exercise its discretion, as set out in the section. The court is empowered under the said section to exercise its discretion in the light of facts and circumstances of each particular case. In my view, a stay under this section should not, however, be ordered mechanically, or as a matter of course, but must be made judicially upon an examination of all the facts in their several aspects. Further, a stay ought not to be granted if the object of applying for it appears to be merely to delay the winding up proceedings, [see *Official Liquidator Golcha Properties (P) Ltd v Dharti Dhan (P) Ltd* AIR 1977 SC 740].

[6] Merely alleging there is an application to set aside the registration of the foreign judgment does not come within the provision of the said section. Further, in this case, the foreign judgment was regularly given by a court of competent jurisdiction. The respondent having notice of that proceedings did not take steps to protect their rights, if any. As a matter of principle and jurisprudence, a foreign judgment of competent jurisdiction must prima facie be respected, whether or not it comes within the provision of the Reciprocal, Enforcement Judgment Act 1958 (REJA 1958). In my view, REJA (1958) only regulates the manner the foreign judgment of reciprocating countries can be registered here and gives full force for the purpose of executing the same. This Act does not prohibit the courts from recognising the judgment of foreign courts of competent jurisdiction, in what ever manner they think necessary and fit for the purpose of adjudicating any matter before the court. Support for the proposition can be found in ss 40 to 44 of the Evidence Act 1950 (EA 1950). Much thought has been articulated by the learned writer Hardial Singh Khaira, in his article '*Enforcement of Foreign Judgments Over Immovable Property in Malaysia*, CLJ [2007] 1 QLR 34'. The jurisprudence in this area of law can be summarised as follows:

(a) Until the coming into force of enforcement of foreign judgments in England, the English Courts, till the middle of the nineteen century acknowledged foreign judgment based on the concept of comity. Under the said concept, the adjudicating courts recognised the legitimate laws of other states, in the expectation that the other states would in turn also accept the laws of the adjudicating state when the need arose. The US Supreme Court defined comity as:

> [N]either a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws [*Hilton v Guyot* [1895] 159 US 113].

(b) The concept of comity in England was later superseded by the doctrine of obligation. In *Schibsy v Westenholz* [1870] LR 6 QB 155, Blackburn J opined:

> We think that... the true principle on which the judgments of foreign tribunals are enforced in England is... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for

which judgment is given, which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

(c) Further augmentation took place in the Privy Council decision of *Sirdar Gurdyal Singh v The Rajah of Farikode* [1894] AC 670 (PC) where Lord Selbourne opined:

> In a personal action to which none of these causes of jurisdiction previously discussed apply, a decree pronounced in absentem by a foreign court to the jurisdiction of which the defendant has not in any way submitted himself is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity, by the courts or every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced.

(d) The REJA 1958 must also be read with the provision of ss 40 to 44 of the EA 1950, where applicable and necessary. Under the common law for a foreign judgment to be recognised by the adjudicating court, three conditions must be satisfied namely:

(a) the foreign court must have exercised a jurisdiction which the courts will recognise; (b) the judgment must be final and conclusive; (c) if based on an action in personam, the judgment must be for a fixed debt. The common law principle may not be sine qua non for the courts to acknowledge a foreign judgment for the purpose of the matters stated in ss 40 to 44 of the EA 1950. Under section 44 of the EA 1950, the validity of a judgment can be questioned on three grounds namely: (a) lack of jurisdiction of the court which made the order; (b) in the event order was obtained by fraud; or (c) collusion. This section will apply to any of the judgments or orders specified in ss 40 to 43 of the Act. Section 44 of the EA 1950 states:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under ss 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

(e) The REJA 1958 makes provision for the enforcement of foreign judgment in this country, provided the conditions stated in the Act are satisfied. The procedure to enforce such judgment is set out in the Act as well as O 67 of the RHC 1980. The judgment can be registered, if it is final and conclusive in respect of a liquidated sum. The judgment is deemed to be conclusive notwithstanding that an appeal may be pending against it, or that the judgment is pending appeal in the courts of that country as set out in s 3(4) of REJA 1958. However, this provision does not prohibit the adjudicating court from allowing any application for stay of the execution process for any reason whatsoever, although the judgment has been registered here. Further, in an application for stay it will not be seen to be a valid ground for the defendant only to allege that the provisions of O 67 of the RHC 1980 were not complied with, unless the defendant can demonstrate that he was prejudiced by the said non-compliance of O 67 RHC 1980.

In my view, the law, though it enables foreign judgment to be registered it does not mean that court here has no powers to declare that the convenient forum to adjudicate the dispute will be the place where the defendant resides and the judgment, if any can be executed. Such an application by the defendant must be made as soon as he receives the notice to file proceedings from the foreign plaintiff. If the defendant succeeds in his application, the foreign plaintiff will be obliged to recognize the order of the courts here, if ultimately the foreign plaintiff intends to register the judgment here for the purpose of execution. Further, it will only be fair and just for a foreign plaintiff to commence an action where the judgment can be ultimately executed. Procedural fairness requires the defendant to have an opportunity to defend the action in a convenient forum. This will also accord with the protection afforded to litigants under the Federal Constitution. Generally, the forum cannot be said to be convenient if the judgment granted by the foreign court can only be executed here. In this case, the respondent had not made such an application or promptly defended the action in Singapore. Further, the grounds stated for the stay does not warrant this court to exercise its discretion for reasons stated above. In consequence, I dismissed the respondent's encl 31 on 27 July 2007 with costs to the petitioner.

SHAREHOLDERS' STAY

[7] The shareholders of the respondent had filed an application, encl 76 to stay the proceedings of this action pursuant to r 7 of the companies winding up rules and the inherent jurisdiction to prevent injustice pending the following: (a) the decision of the Chief Judge in respect of an application to transfer the petition herein to High Court I with a direction that it be heard after Kuching Originating Petition No 26–01 of 2006–I filed under s 181 of the CA 1965 ('181 petition'); or (b) the decision of the Chief Judge in respect of an application to transfer the 181 petition to this Court with a direction that it be heard before the petition herein; or (c) alternatively, that the proceedings herein be stayed until after the 181 petition has been disposed of. Counsel for the applicant had informed the court that the shareholders have filed the application under s 181 of the CA 1965 and if the respondent is wound up, then their petition under s 181 will become redundant and the shareholders will not be able to ventilate their grievance. I then posed a question whether the shareholders are in a position to give an undertaking to pay the creditors. The learned counsel informed me that he must take instruction, as at the date of the judgment, the court has not been informed of the outcome. In consequence, I take it that the shareholders have no such intention to give such undertaking. That being the case, it will not be appropriate for me to stay proceedings on the grounds stated by the applicant. The 181 petition is in respect of matters to do with the shareholders of the company. The 218 petition here is presented by the creditors on the grounds of the respondent's inability to pay the debt. In this case, there is no nexus between the 181 and 218 petitions for it to be stayed or transferred. In consequence, I did not have any hesitation in dismissing encl 76 with costs. On 27 July 2007, I made the same with a directive that the applicant pays the costs to the petitioner. I further

decreed that the getting up fees should not exceed RM5,000 and if costs cannot be agreed, the petitioner is at liberty to tax the costs.

WINDING UP PETITION

[8] The respondent opposes the petition, inter alia and says that: (i) the judgment was not exhibited in the petition. As such, there is no basis for the presentation of this petition. Further, notice of registration of foreign judgment is defective and bad on the ground that it failed to state the particulars of the order for registration and failed to state the alleged outstanding amount in the currency of Malaysia; (ii) High Court of Sabah and Sarawak in Kuching has no jurisdiction to determine the quantum of the award of costs that was granted by the High Court of Singapore; (iii) the respondent has applied to set aside the registration of the judgment; (iv) the said judgment is a judgment in default without the consideration of the merits of the respondent's defence and the respondent disputes the claim; (v) interest calculated till the wrong date; (vi) statutory notice pursuant to s 218 of the CA 1965 was defective as it failed to state its demand in the currency of Malaysia; (vii) petition and the statutory notice is defective for claiming a sum of USD1,342,261.82, which is contrary to the terms and in excess of the judgment and order.

[9] I have read the petition, opposing affidavits and submission in detail. I do not think the purported grounds raised by the respondent are sufficient to defeat the petitioner's application to wind up the company. My reasons are as follows:

[10] A creditor to whom the company is indebted to a sum exceeding RM500, can present a winding up petition. The sum claimed must be a liquidated amount. There is no requirement that all sum claimed must be liquidated. As long as a sum exceeding RM500 is a liquidated sum, it is sufficient to satisfy the requirement set out in s 218(2)(a) of the CA 1965. Under s 218(2), the company is unable to pay its debts if:

> (2) A company shall be deemed to be unable to pay its debts if —
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> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
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> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
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> (c) it is proved to the satisfaction of the court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

[11] On the facts of this case, the petitioner cannot be said to be making a claim on a disputed debt. In this case, the petitioner holds a final judgment from a court of competent jurisdiction which till date has not been set aside or there is no credible evidence to show that the respondent had made prompt attempt to contest the judgment in Singapore or set aside the registration of the said judgment. Generally, creditor's petition for winding up is only presented upon judgment having been obtained. A judgment in default for all purposes can be said to be a final judgment, unless there is an application to set aside the judgment and/or there is an appeal in respect of the application. In *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100, it was stated that a petition for winding up can be presented based on a judgment in default, even if the default judgment is irregular. The default judgment is good and enforceable until it is set aside. However, it must be emphasised that a default judgment cannot be treated as a final judgment when there is an appeal pending and/or an application for it to be side aside (see *Re Udos ak Riging* [1994] 3 MLJ 383) provided the said application is not only made promptly, but the applicant can demonstrate to the court that all attempts to expedite the hearing of the applicant has been made. This is to ensure that the applicant is not attempting to delay the winding up proceedings, the proceedings of which need to be expeditiously dealt with.

[12] There is no rigid rule that the sum claimed in the statutory demand must be the precise sum. Support for the proposition is found in a number of cases, some of them are as follows; (i) In *Kampat Timber Industries Sdn Bhd v Bensa Sdn Bhd* [1990] 2 MLJ 46, Abu Mansor J held that minor irregularity in the statutory demand could be waived. The learned judge in that case held that the real issue was whether the company was able to pay its debt. Since evidence showed that the company was insolvent, winding-up order was made in this instance; (ii) In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313, a mistake in the statutory demand regarding the time available for the debtor to pay was held not to have vitiated the demand; (iii) The Supreme Court of Malaysia in the case of *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 held that where the company admitted it owed a substantial part but not all of the debt claimed, the presumption of insolvency arose upon neglect to pay the admitted sum; (iv) In *YPJE Consultancy Service Sdn Bhd v Helelr Factoring (M) Sdn Bhd* [1996] 2 MLJ 482, in the Court of Appeal, Ahmad Fairuz JCA (as he then was), held that the statutory presumption of insolvency arose as monies involved in disputed sum claimed, exceeded RM500. It was further held that failure to quantify interest was not fatal to the efficacy of the statutory demand.

[13] In my view, the purported grounds raised by the respondent can only amount to sham grounds in respect of an application under s 218(1)(e) of the CA 1965. For, the law in principle requires the respondent to demonstrate that the respondent can pay the debts rather than to say that he had good reasons why the final judgment should not be paid. I have dealt with the principles relating to winding up of company for inability to pay debts in my judgment delivered on 20 June 2007 in Kota Kinabalu High Court case CWU No K28–54 of 2004 *PT Bank Mandiri (Persero) Tbk v Karambunai Corp Berhad*, the relevant part of which reads as follows:

A Circumstances in which a Company can be wound up are set out in s 218 of the CA 1965. This section makes it clear that the right to wind-up the company is absolutely at the discretion of court and the section does not give any person or body any substantive right to wind-up the company. …

B In contrast, the sine qua non for seeking a winding up order by a creditor is that the creditor must satisfy the court on the face of the petition that he has locus standi to present the petition and convince the court that the company is unable to pay its debt. Where the petition is not based on a judgment sum, the petitioner must show the claim is bona fide and is not an attempt to recover disputed debts through courts' process in a summary nature. It will be abhorrent to notion of justice and fair play to entertain an application for a winding up petition on a disputed sum without allowing the respondent to ventilate the grievance according to substantive law and this proposition is an entrenched constitutional right well articulated in art 13 (1) of the Federal Constitution. Section 218 of CA 1965 cannot be read in isolation of the Federal Constitution and deprive the asset of a person in a summary manner when the law permits the issues to be ventilated upon proper judicial scrutiny. It is wrong to rely on English decisions totally relating to s 218(1) (e) when England stands as a country without constitution such as art 13 of the Federal Constitution which states:

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13(1) No person shall be deprived of property save in accordance with law. …

E **[14]** For reasons stated above, I am inclined to agree with the submission of the petitioner. In consequence, the petition is allowed with costs. I hereby order so.

Petition allowed with costs.

F Reported by Sally Kee

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